United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2282

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

THOMAS A. VINCEL, GRACE VINCEL, NUNO TARDO, IRENE TARDO, WILLIAM BREEN, VIRGINIA BREEN, JOSEPH RUMMO, ROLF HOEGER, M. D. AIELLO, P. AIELLO, & LIRCO CREDIT CORPORATION,

Plaintiffs-Appellants,

—against—

WHITE MOTOR CORPORATION & GLENN F. KOMMER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Material Facts

1. Introduction.

The brief of appellees is permeated by an utterly false concept of the material facts of this case, and by repeated misrepresentations that the defendants' version of the material facts is "uncontested" and "undisputed."

The claim of the defendants that plaintiff Thomas A. Vincel caused the liquidation of Long Island Diamond Reo

Truck Co. Inc. ("Long Island Reo") is simply the reverse of what the plaintiffs have alleged in their pleadings and supporting affidavits, and seek to prove. The plaintiffs have made a prima facie showing that the liquidation of Long Island Reo was caused by the defendants in violation of their contractual, fiduciary, and statutory obligations to the plaintiffs.

The amended complaint alleges, and is supported by documentary evidence and affidavits, that in December 1966 the defendants took over control of Long Island Reo from the plaintiffs; that in February 1967 the defendants also took over the management of Long Island Reo from the plaintiffs; that the defendants used their management and control of the corporation to make it default on secured obligations to defendant White Motor Corporation ("White Motor"); and that in August 1967 the defendants, using as a pretext the defaults that they had engineered, seized the bank accounts, stock in trade, and other assets of Long Island Reo, terminated its business, and caused it to be totally liquidated. 234A - 240A, 285A - 300A, 23A - 35A, 39A - 51A.

2. Control of Long Island Reo.

After December 1966 plaintiff Thomas A. Vincel was no longer the majority stockholder of Long Island Reo. He

and plaintiffs Nuno Tardo and William Breen had turned over all their voting stock in Long Island Reo (85% of the voting shares) to defendant Glenn Kommer, who was an employee and the designee of, and acting for, White Motor. 235A - 237A. Defendant Kommer thus became the majority stockholder of Long Island Reo, and (with White Motor, his principal) a trustee for the plaintiffs. Plaintiff Thomas A. Vincel continued to be the president and a director of Long Island Reo, but after December 1966 he held those positions at the pleasure of the defendants.

3. Management of Long Island Reo.

In December 1966 the defendants also acquired the power to cause the directors of Long Island Reo to appoint a person acceptable to the defendants, and paid by the defendants, as the general manager of Long Island Reo. 44A. The defendants exercised that power in January and February 1967. Defendant Kommer then employed one Samuel Antelis as the general manager of Long Island Reo, and caused the board of directors to make the appointment. 481A, 482A, 234A - 238A, 289A. An essential part of Antelis' job was to act as the Regional Representative of White Motor referred to in the Financing Agreement. 490A, 32A, 289A - 290A.

4. Position of Antelis.

The brief of appellees (at page 13) claims, in its statement of "undisputed material facts", that Antelis "was not and never has been the Regional Representative of White," and that "there is no evidence of that contention." 1/

The amended complaint (and the original complaint) allege that Antelis acted at all times as the agent and employee of the defendants. 238A, 12A. The affidavit of plaintiff Thomas A. Vincel states that White Motor "referred to Antelis and regarded him as White's Regional Representative." It describes Antelis as "White's Regional Representative and the General Manager of L. I. Reo". 290A, 303A.

An inter office letter of the Diamond Reo Truck Division of White Motor dated August 16, 1967, lists Antelis as one of the "regional managers" of White Motor. 490A. Antelis among others is told to check the location of all factory trucks in the hands of his dealers.

Other documents supplied by the defendants confirm the fact that Antelis was in fact, was treated by the defendants

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1/ The 1974 memorandum and order of the court below seems to acknowledge that there is evidence supporting the contention of the plaintiffs that Antelis functioned as White Motor's "regional manager" within the meaning of the Financing Agreement. 419A.

as, and considered himself as, an employee of White Motor, not of Long Island Reo, and a representative of the defendants. Antelis was a member of the hospitalization and Blue Shield programs and, for a time, of the contributory pension plan of White Motor, not of Long Island Reo. 484A, 485A, 488A. If he took any time off, he was to file a written form with White Motor. 489A. Antelis was told by defendant Kommer to conduct routine car checks, and surprise car checks, of the new and used truck inventory of Long Island Reo, reporting the results to defendant Kommer. 486A. When it appeared that the Bank of Commerce would lend $75,000 to Long Island Reo, Antelis was ordered by defendant Kommer not to disburse <u>any</u> of the proceeds of the loan to any person, for any reason, without the express permission of defendant Kommer. 463A. In May 1967, defendant Kommer referred to Antelis as a "new employee" of the Lansing Division of White Motor. 478A. Antelis reported to Kommer and took his orders from Kommer, not from Vincel. He received his salary from White Motor, not from Long Island Reo. 487A, 489A.

In January 1967 defendant Kommer indeed searched for a general manager <u>of</u> Long Island Reo, but <u>for</u> White Motor (cf. brief of appellees, pp. 12 - 13). Plaintiff Thomas A. Vincel was instructed by defendant Kommer to have the board of directors of Long Island Reo appoint Antelis as its general manager. As they well knew, defendant Kommer had

the power to "cause" Long Island Reo's board of directors to appoint anyone he might choose as Long Island Reo's general manager. 44A. Plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen complained to defendant Kommer about his selection of Antelis, but defendant Kommer told them that Antelis was his choice and that he, Kommer, was running Long Island Reo. 289A.

5. Day-to-day operation of Long Island Reo.

Nor is it the fact, or "undisputed," that after the appointment of Antelis the day-to-day affairs of Long Island Reo were "still managed *** by plaintiffs". Brief of appellees, p. 14. The Vincel affidavit, brushed aside by the court below and in the brief of appellees, states that upon Antelis' takeover as general manager, plaintiff Thomas A. Vincel stopped acting as general manager and devoted himself to selling trucks. 289A. The annual salaries of plaintiffs Thomas A. Vincel and Nuno Tardo were reduced from $42,594 in 1966 to $34,800 in 1967. 229A. Antelis took charge of personnel, and of all decisions concerning credit policies and banking policies, and was in complete charge of the bank accounts and other financial affairs of Long Island Reo. Antelis made the deposits, wrote and signed virtually all checks, took care of the payroll, and ran the

accounting and bookkeeping departments of Long Island Reo. All trucks ordered from the factory were ordered in the name of Antelis, in line with the procedure outlined in the Financing Agreement:

> "White will transport each finished truck to New York at L. I. Reo's expense and shall deliver same to White's Regional Representative and title shall remain in White's regional inventory." 32A.

289A - 290A, 294A - 297A.

6. Defendants' preparations for liquidation.

The defendants' control of Antelis, and the defendants' control and management of Long Island Reo, enabled them to learn every detail of the marketing and servicing of Diamond Reo trucks in the area. By August 1967 White Motor had arranged for its own branches and dealers selling the heavy White trucks (manufactured in Cleveland), including the branch of White Motor located in the service area of and competing with Long Island Reo, to pick up the sale of the lighter Diamond Reo trucks (manufactured in Lansing). The method used was to change the radiator grille on trucks manufactured in Lansing, and to place the White name on the radiator cover. The circular of the White Truck division of White Motor to its dealers and branches, advising

them of this "new line" for them to handle, is dated August 25, 1967, the day the defendants chose to put Long Island Reo out of business. 290A - 291A, 307A - 308A.

7. The cover story, and the conspiracy.

There is no substance to the claims (not facts, and not undisputed), in the brief of appellees at pp. 2, 5-6, and 17, that White Motor "attempted to save L. I. Reo", that the defendants made "strenuous efforts * * * to keep L. I. Reo financially solvent and in business", and that the employment of Antelis involved providing "management assistance as requested by plaintiff Vincel." The only basis of those claims is the imaginative affidavits of a lawyer for the defendants. 255A, 309A.

The plaintiffs allege and seek to prove that the plan and conspiracy of the defendants, from November 1966 on, were to acquire domination and control of Long Island Reo and its financial affairs, to destroy its working capital, to acquire its assets, and to put it out of business. 234A. The actual, undisclosed purpose of the defendants when they signed and compelled plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen to sign the Financing Agreement and the Voting Trust Agreement was for White Motor to continue

profiting from the sale of Diamond Reo trucks and parts to customers of Long Island Reo for a few months, until the branch of White Motor operating in the same area was ready and able to take over the sale and servicing of Diamond Reo trucks, and then to put Long Island Reo out of business. 290A. By August 28, 1967, when defendant Kommer resigned as trustee and surrendered the voting stock, that plan and purpose had been achieved by the defendants.

8. "Floating," 1962 - 1966.

There are repeated references in the brief of appellees to the fact that Long Island Reo had been "out of trust" with respect to some trucks prior to the takeover of control and management by the defendants. That is another way of saying that Long Island Reo was holding back payments to financing agencies on the sale of vehicles, for a relatively short time after the due dates, in order to maintain working capital, and is also described as "floating." 283A.

Floating is done by most or all dealers in automobiles and trucks. At least from 1962 on, White Motor knew of the floating by Long Island Reo, and condoned it by directing Vincel never to float more than $100,000. 283A, 284A. With full knowledge of the floating, White Motor in 1962 guaranteed the obligations of Long Island Reo to C.I.T.,

and in November 1966, for ample consideration, released plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen, and Long Island Reo, from any liability to White Motor that the prior floating could have involved. If the floating prior to December 1966 involved any fraud, White Motor was a party thereto and not a victim thereof. 283A - 285A.

9. "Floating," 1967.

Antelis took office on February 6, 1967. 481A. By August 1967, if Long Island Reo was "out of trust" in respect of a truck, it was the defendants and their man Antelis who effected the breach of trust. When a sale was made and the truck shipped from Lansing, it was Antelis who received it as the Regional Representative of White Motor. 32A. When the customer made a payment, it was Antelis who received and deposited the funds. When the truck was delivered to the customer, it was the responsibility of Antelis to see that White Motor was paid. If the proceeds of the sale had been otherwise spent, Antelis had directed the expenditures and, in most cases, had signed the checks. 289A - 290A, 294A - 297A. Any "floating" that occurred was done by Antelis, who was at all times an employee and representative of the defendants. Antelis was reporting and accounting to the defendants, and

following their instructions.

The concealment of those facts enabled the defendants to obtain the State court orders they needed to close down the business and seize the principal assets of Long Island Reo. The disclosure of those facts enabled the bankruptcy trustee, on behalf of the creditors he represented, to induce White Motor to abandon its claims as a creditor (filed in the amount of $325,610) and to pay $100,000 into the estate. 300A.

10. Controversies between plaintiffs and defendants.

In November 1966 White Motor made its first attempt to take from the plaintiffs the business that the plaintiffs had spent eight years developing. There were accusations and threats by White Motor against plaintiffs Thomas A. Vincel and Nuno Tardo, and counter accusations by those plaintiffs and plaintiff William Breen against White Motor. 284A - 288A.

Paragraph 1 of the Financing Agreement involves mutual releases of those claims, and a commitment of plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen to use their best efforts to cause all the other plaintiffs to execute a similar release of White Motor. 24A - 25A.

Those three plaintiffs were required by paragraph 3 of the Financing Agreement, and by the Voting Trust Agreement,

to surrender the management and control of Long Island Reo, and of four affiliated corporations, to the defendants. 26A - 27A, 39A - 48A. Plaintiff Thomas A. Vincel was also required personally to guarantee a 6-1/2% note of Long Island Reo to White Motor in the principal amount of $196,000. 29A. In return, the express obligations of the defendants under both agreements run to those three plaintiffs as parties. The defendants became express trustees for them, and implied trustees for all the plaintiffs. The fiduciary obligations of the defendants to all the plaintiffs were enhanced in February 1967, when the defendants took over the day-to-day management of Long Island Reo.

By taking over the control and the management of Long Island Reo, the defendants assumed fiduciary obligations directly to all the plaintiffs, apart from whatever obligations they also assumed to Long Island Reo. The bankruptcy trustee, representing the creditors of Long Island Reo, had no concern with the defendants' obligations running directly to the plaintiffs, or for that matter with the claims that the defendants had asserted and continue to assert against plaintiff Thomas A. Vincel. The settlement of the bankruptcy trustee with White Motor, and the order of the bankruptcy court approving it, expressly preserve the claims of White Motor and plaintiff Thomas A. Vincel against each other. 93A, 117A, 385A.

Those were and are substantial claims, and are not in any sense "derivative". Cf. brief of appellees, p. 25.

White Motor's State court action was commenced on August 25, 1967, against Long Island Reo only. 128A, 135A; cf. brief of appellees, p. 14. On September 1, 1967, White Motor filed an amended complaint bringing in plaintiff Thomas A. Vincel as a defendant, and demanding judgment against him in the amount of $153,000. 143A, 152A. Now, in this case, the defendants have filed counterclaims against plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen amounting to more than $800,000, including the claims asserted by White Motor against Vincel in the State court proceeding. 70A, 86A.

Thus the defendants have taken the position that whatever occurred in 1967 gave rise to substantial issues as between them and at least three of the plaintiffs, and that those issues were not disposed of in their settlement with the bankruptcy trustee. The "eight years of litigation" referred to in the brief of appellees, at page 17, is a two-way battle initiated by the defendants, which would not be disposed of by the order of the court below. That order would wipe out the claims of the

plaintiffs against the defendants, but would leave the defendants free to press their claims against the plaintiffs, a grossly inequitable result. 420A.

11. Business destroyed by the defendants.

The business that the plaintiffs conducted in the sale and servicing of Reo trucks and of Diamond Reo trucks manufactured by White Motor, first as partners and then through Long Island Reo, was a substantial and growing business that had provided six of the plaintiffs with a livelihood. The plaintiffs had invested approximately $78,000 in the stock of Long Island Reo including $5,000 ($1,000 per share) paid for five shares in August and November 1966. 511A, 443A - 445A. There were 112.19 shares outstanding, all owned by the plaintiffs. 228A - 229A.

The references in the brief of appellees (at p. 16) to the business, earnings, and assets of Long Island Reo are partly false and altogether misleading.

At the time of the first takeover attempt of the

defendants, on November 2, 1966, the business of Long Island Reo was dynamic and growing despite its many problems. For the year ended September 30, 1962, during which a publication of White Motor referred to Long Island Reo as "the second largest Reo distributorship in the World", gross sales amounted to approximately $1,871,000. 281A - 282A, 302A, 306A. For the year ended September 30, 1966, gross sales had increased to approximately $2,962,000. 302A, 510A. There was a net loss after taxes, but that reflected among other things rent paid to an affiliate and salaries and fringe benefits paid to the plaintiffs. 510A, 512A, 514A. It is not at all unusual for a successful closely held corporation to break even, or to show a small deficit, rather than to realize corporate profits.

The balance sheet of Long Island Reo at September 30, 1966, shows the stockholders' equity of approximately $25,000, prior to the purchase of additional shares by three of the plaintiffs in November 1966. The brief of appellees (at p. 16) claims that by April 30, 1967, when the defendants had taken over the corporate books, there had been a loss of $15,571, and a conversion of the $25,000 equity (plus $3,000 invested in November 1966) into a $40,000 deficit. The figures don't make sense, are contested by the appellants, and purport to be based on nothing more than what unidentified persons on

the accounting staff of White Motor said to the defendants' affiant. 315A.

Between January 1 and August 31, 1967, despite mismanagement by the defendants, Long Island Reo paid White Motor $789,000 for trucks and parts, and another $87,000 in reduction of the debt from Long Island Reo to White Motor. [2/] 291A.

The plaintiffs, as shown above, had invested the considerable sum of $78,000 in Long Island Reo. Apart from their long-range expectations of profit for the corporation itself, the business had been and was providing a livelihood for six of the plaintiffs and their families. The salaries of plaintiffs Thomas A. Vincel, Nuno Tardo, William Breen, Joseph Rummo, Rolf Hoeger, and P. Aiello amounted to approximately $90,000 per annum in 1966, $81,000 per annum in 1967. [3/] Those plaintiffs also were receiving fringe benefits in the form of

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2/ A small portion of the debt reduction may have occurred in December 1966.

3/ The salaries of plaintiffs Thomas A. Vincel and Nuno Tardo were reduced in 1967, when the defendants took over the management of Long Island Reo.

life insurance, major medical insurance, and a retirement plan. 229A - 232A. Continuation of the business represented their expectation of continued employment, and ultimate profit, and also represented plaintiff Thomas A. Vincel's only hope of meeting the substantial obligations that he had assumed personally to White Motor.

In addition to the $196,000 note of Long Island Reo to White Motor that he guaranteed personally in November 1966, plaintiff Thomas A. Vincel personally guaranteed another such note in the principal amount of approximately $43,000 in February 1967. 80A. In every way possible plaintiff Thomas A. Vincel demonstrated his faith in the business in which he and the other plaintiffs had invested. The defendants did not disclose to the plaintiffs, or even to their man Antelis, their plans for the destruction of Long Island Reo.

The acts of the defendants to impair the working capital of Long Island Reo, summarized in the affidavit of plaintiff Thomas A. Vincel, culminated in their sabotage of the inventory warehouse program that plaintiff Thomas A. Vincel, along with Antelis, negotiated with a warehouse company and a bank to provide a $75,000 line of credit. 291A - 294A, 297A - 299A. Before the defendants decided to block that credit, they warned Antelis not to disburse "<u>any</u>

of the proceeds *** to any person for any reason" without the express permission of defendant Kommer. 463A. Only in June 1967, after the decision to block the credit had been made by the defendants, did plaintiffs Thomas A. Vincel and Nuno Tardo get an inkling of the defendants' real purpose in taking from them, and from plaintiff William Breen, the control and the management of Long Island Reo. 298A - 299A.

One result of the defendants' acquisition of management and control of Long Island Reo from the plaintiffs is the fact that thereby the defendants incurred fiduciary obligations to all the plaintiffs, apart from the specific contractual and fiduciary obligations that they assumed in the Financing Agreement and the Voting Trust Agreement. See brief of plaintiffs-appellants, pp. 34 - 38. The brief of appellees, and the memoranda of the court below, utterly ignore those fiduciary obligations of the defendants to the plaintiffs, and the breach thereof by the defendants.

* * * * * * * *

The appellants do not contend that the material facts summarized above are "undisputed" or "uncontested." They are material facts as alleged by the appellants, with the support of affidavits and documentary evidence, and the

appellants will have the burden of proving them to the satisfaction of a jury if the order of the court below is reversed.

The brief of appellees concedes, indeed asserts, the materiality of the facts, but blandly denies that they are "in genuine dispute." On that question, as shown below, the appellees have the burden of proof to support their motion for summary judgment.

POINT I

The genuine issues as to material facts require reversal of the grant of summary judgment for the defendants by the court below.

Rule 56(c) of the Federal Fules of Civil Procedure permits summary judgment to be rendered only if the pleadings, affidavits, and other evidence on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 4/ The

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4/ Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and where no genuine issue remains for trial. The purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620, 627-9 (1944).

moving party has the burden of making that showing. Here the record, and the briefs on appeal, demonstrate that there are genuine issues as to many material facts, and that the defendants are not entitled to judgment as a matter of law.

When a motion for summary judgment is made, the district court should deny summary judgment if there is a genuine issue as to any material fact, including any issue of fact arising from conflicting inferences which can be drawn from evidence accepted as true. Empire Electric Co. v. United States, 311 F. 2d 175 (2nd Cir. 1962).

In Empire Electric each party had moved for summary judgment, and had stipulated that "there was no genuine dispute as to the material facts herein." 311 F. 2d at 177. The Court of Appeals reversed the grant of summary judgment, and said (311 F. 2d at 179 - 180):

> "'Only when the evidence is such that it is clear the jury would have none to go on, though they believed that unfavorable to the movant for summary judgment, can the motion be sustained.' *** The cases hold also that in ruling on a motion for summary judgment, all doubts as to the existence of a 'genuine issue of material fact' must be resolved against the moving party. *** The District Court must therefore take that view of the evidence most favorable to the opponent of the moving party, giving the opponent the benefit of all interences that may reasonably be drawn."

The court below utterly failed to meet that standard. The memoranda of the court below disregard and brush aside many of the material facts, summarized above, that show the defendants' assumption of contractual, fiduciary, and statutory obligations running directly to the plaintiffs, and that show action taken by the defendants, damaging to the plaintiffs, in violation of those obligations. The 1972 memorandum and order, 154A - 226A, dismissing the fourth cause of action stated in the original complaint, accepts most of the defendants' factual contentions and invites a motion for summary judgment. 194A - 195A, 213A - 220A. The 1974 memorandum and order, 386A - 423A, starts with that version of the facts, and then acknowledges some of the factual contentions of the plaintiffs, but never takes "that view of the evidence most favorable" to the plaintiffs.

The wording of the amended complaint is compared at length with that of the original complaint. 387A - 401A. Minor references are later made to the affidavit of plaintiff Thomas A. Vincel. 415A - 418A. The basic facts set forth in that affidavit, and in the amended complaint, are mostly ignored.

The 1974 memorandum and order deals with the Voting

Trust Agreement, 39A, but only to construe one of its basic provisions as meaningless. 401A - 402A, 404A - 405A.

In the Financing Agreement, 27A, and throughout the Voting Trust Agreement, 39A - 49A, defendant Kommer is referred to as "the Trustee." That agreement empowered the Trustee to oust plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen of their control of Long Island Reo, and then to take over the management, acting at all times for and with White Motor.

Under Section 8 of the agreement, the Trustee "may cause" Long Island Reo's board of directors to appoint a person acceptable to him to act as Long Island Reo's General Manager. 44A. Under Section 12 of the agreement, if a registered holder of voting trust certificates dies, the Trustee "shall cause" the shares held for the benefit of that person to be transferred to his legal representative, heirs, successors or assigns. 46A. Under Section 4 of the agreement, the Trustee "will not cause" any of the corporations to be dissolved, or totally liquidated, or partially liquidated without the prior written consent of plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen. 42A.

Each of those sections speaks of what the Trustee may, or shall, or will not "cause." None of them mentions

the word "vote." The transfer that the Trustee might be required to cause under Section 12 would not involve a vote. The appointment that the Trustee was empowered to cause under Section 8 could be, and was, caused without a vote. The liquidation that the Trustee was committed not to cause under Section 4 also could be, and was, caused without a vote, by the institution of legal proceedings and the seizure of property while the agreement was still in effect.

The court below, however, looks at Section 4 as though it were in a vacuum, unrelated to other provisions of the Voting Trust Agreement and to the extraordinary powers that the defendants had acquired through that agreement and the Financing Agreement. The 1974 memorandum refers to defendant Kommer as the "Voting Trustee," and construes the word "cause" in Section 4 to mean nothing but a vote of the deposited stock. 401A - 402A. It ignores the other sections where the word "cause" also appears, and also ignores the sworn statement of plaintiff Thomas A. Vincel that Section 4 of the Voting Trust Agreement was of special importance to him and was intended to protect plaintiffs Nuno Tardo, William Breen, and himself from the destruction of their business, as previously threatened by White Motor. 288A - 289A.

It is at least a reasonable inference that the word "cause" was used consistently in the Voting Trust Agreement, and meant what it seems to mean, and what it did mean to the plaintiffs.

In Cali v. Eastern Airlines, Inc., 442 F. 2d 65, 71 (2nd Cir. 1971), reversing 318 F. Supp. 474 (E.D.N.Y. 1970, Dooling. D. J.), this Court said:

> "[W]hen the Court grants summary judgment, it must resolve all ambiguities and draw all reasonable inferences favorable to the party against whom summary judgment is sought, *** bearing in mind that the moving party has the burden of showing an absence of any material factual issue for trial ***. If undisputed evidentiary facts disclose competing material inferences as to which reasonable minds might disagree, the motion must be denied."

In United States v. Diebold Inc., 369 U.S. 654, 655 (1962), the United States had brought an anti-trust suit challenging the defendant's acquisition of the assets of another corporation (HHM). The district court granted summary judgment to the defendant, based upon its findings that HHM was hopelessly insolvent, and that Diebold was the only prospective purchaser of the business. The per curiam opinion of the Supreme Court, reversing the District Court, states:

> " * * * [B]oth findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached

> exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."

In Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962), the Court said:

> "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of 'even handed justice.'"

In White Motor Co. v. United States, 372 U.S. 253 (1963) the Supreme Court reversed the district court's entry of summary judgment for the plaintiff, the United States, except that summary judgment for the United States was affirmed as to price fixing by White Motor. 372 U.S. at 260. The opinion of the Court (Douglas J.) states, 372 U.S. at 259, 264:

> "Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, they are not appropriate 'where motive and intent play leading roles.'"

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> "We conclude that the summary judgment, apart from the price fixing phase of the case, was improperly employed in this suit. Apart from price fixing, we do not intimate any view on the merits. We only hold that the legality of the territorial and customer limitations should be determined only after a trial." 5/

See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-9 (1970); Lemelson v. Ideal Toy Corp., 408 F. 2d 860 (2nd Cir. 1969); Friedman v. Meyers, 482 F. 2d 435, 438-9 (2nd Cir. 1973); United States v. J. B. Williams Co., 498 F. 2d 414, 431-2 (2nd Cir. 1974).

Here, as shown above and as indicated, with some exaggeration, 6/ in the brief of appellees, the court below has resolved ambiguities and drawn inferences in favor of the moving party, the defendants. The plaintiffs have alleged, with supporting affidavits and documentary evidence, facts that

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5/ The concurring opinion of Mr. Justice Brennan refers to White Motor's attempt "to retain a distribution system for the general run of its customers, while skimming off the cream of the trade for its own direct sales." 372 U.S. at 274. The dissenting opinion of Mr. Justice Clark would sustain the grant of summary judgment on the ground that the "bare bones" of the documentary evidence of White Motor's restrictions on its distributors and dealers "really lay bare one of the most brazen violations of the Sherman Act that I have experienced in a quarter of a century." 372 U.S. at 275-6.

6/ The memoranda of the court below do not go as far as the brief of appellees suggests in accepting the most extreme claims of the defendants.

would support a jury verdict against the defendants. The grant of summary judgment by the court below should be reversed.

POINT II

The plaintiffs have standing to maintain the causes of action set forth in their amended complaint.

A. Direct relationships between plaintiffs and defendants.

The brief of appellees seeks to evade the basic fact that the defendants entered into direct contractual and fiduciary relationships with the plaintiffs, as well as with Long Island Reo. This is not a derivative action on behalf of the corporation, or a representative action on behalf of stockholders or employees as a class. The plaintiffs claim, and seek to prove, that the defendants damaged the plaintiffs in violation of their contractual, fiduciary, and statutory obligations to the plaintiffs.

The defendants in turn claim that plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen damaged the defendants. The defendants are seeking to recover more than $800,000 from those three plaintiffs. 70A, 86A. Those direct claims of the defendants against the plaintiffs are not even mentioned in the brief of appellees, but they remain as claims to be met

by the plaintiffs whether or not the plaintiffs' claims against the defendants survive this appeal.

It was the defendants who insisted, in 1966, that those three plaintiffs become parties (a) to the Financing Agreement with White Motor, and (b) to the Voting Trust Agreement with defendant Kommer, and that the other plaintiffs sign individually certain commitments related to those agreements. On August 25, 1967, the defendants instituted their State court action that caused the liquidation of Long Island Reo, with White Motor as the plaintiff and Long Island Reo as the defendant. 128A, 135A. One week later they amended the complaint to bring a claim against plaintiff Thomas A. Vincel personally. 143A, 152A. In October 1967 he in turn filed counterclaims against White Motor and defendant Kommer. 328A, 338A.

Those claims of the plaintiffs, and against the plaintiffs, had never been adjudicated, or settled, when this action was brought by the plaintiffs.

B. Defendants' confusion of cause of action with damages.

The plaintiffs are not suing the defendants for violation of any duties allegedly owed to Long Island Reo. Cf. brief of appellees, p. 21. The plaintiffs are suing for the defendants' violation of duties owed directly by the

defendants to the plaintiffs.

In substantial part, the injuries inflicted by the defendants on the plaintiffs involved the total destruction by the defendants of the plaintiffs' equity in Long Island Reo. See General Rubber Co. v. Benedict, 215 N.Y. 18 (1915), where the entire injury inflicted by the defendant on the plaintiff was a reduction of value of the plaintiff's stock in a subsidiary corporation, caused by the defendant's defalcations from the subsidiary. In General Rubber, the defendant argued that since his duties to the subsidiary overlapped his duties to the plaintif a double liability was threatened if the plaintiff's cause of action was sustained. As stated by Judge Cardozo that argument, which the defendants here also make, "confuses the cause of action with the damages." 215 N.Y. at 24. 7/

7/ The brief of appellees, at pp. 23-4, completely misstates the reasons set forth in General Rubber for the court's conclusion that "the menace of a double recovery is illusory." 215 N.Y. at 26. The court there did not speak of adjustment of any recovery by the subsidiary corporation itself. The court there did say that the value to the plaintiff, if any, of the subsidiary corporation's remedy against the defendant would be reckoned in computing the damages of the plaintiff. Here too the value to the plaintiffs, if any, of White Motor's contribution to the estate of Long Island Reo can be computed when the question of plaintiffs' damages is reached.

The existence of a cause of action does not depend upon the extent of the recovery that may be allowed. 215 N.Y. at 25 - 26. Not one cent was received by the stockholders of Long Island Reo through the compromise that White Motor negotiated with the bankruptcy trustee, representing creditors of Long Island Reo. Not one cent was contributed to the creditors, or to the estate, by defendant Kommer. If in fact the contribution by White Motor to the estate, for payment to the creditors, was indirectly of benefit to the stockholders, that is a matter to be adjusted in the computation of the damages to which the plaintiffs are entitled. It is not relevant to the existence of the plaintiffs' cause of action, or to the defendants' motion for summary judgment.

C. Loss of employment.

At the time the defendants took over the control and management of Long Island Reo and incurred their fiduciary obligations to the plaintiffs, and throughout their domination and control of the corporation, the defendants knew that six of the plaintiffs depended upon the continuation of the corporate business for their livelihood, and that plaintiff Thomas A. Vincel was the personal guarantor of substantial corporate obligations. The defendants were on notice of the various kinds of injury that they would inflict upon the

plaintiffs by destroying the corporate business, in violation of their fiduciary, contractual, and statutory obligations to the plaintiffs. The defendants are liable to the plaintiffs for all such injuries, including the loss of employment of six of the plaintiffs, not as ordinary tort feasors or arm's-length contractors, but as fiduciaries for the plaintiffs. The loss of employment is one element of the damages to be proven, and is not the basis of a separate cause of action in this case.

D. Defendants' confusion of liquidation with dissolution.

It was not the filing of a bankruptcy petition, months after the defendants had put Long Island Reo out of business, that caused the liquidation of Long Island Reo. It was the institution of the State court proceeding by the defendants, their seizure of corporate assets, and their termination of its business and its franchises.

As stated in the brief of appellees, at pages 32 - 33, liquidation, and dissolution, are not the same thing as bankruptcy. Nor is liquidation the same thing as dissolution. Dissolution is a method of doing away with the corporate entity that may involve or follow liquidation, but need not.

Liquidation means the conversion of physical capital assets into intangible monetary assets, or into a reduction of liabilities, or both. It signifies a change in the capital

assets of the corporation, and not in the corporate structure. Liquidation may be total, or partial.

The prohibitions in Section 4 of the Voting Trust Agreement against the Trustee causing the dissolution of Long Island Reo, or its total liquidation, or its partial liquidation, are prohibitions against his causing any one or more of those different events.

The dissolution of a New York corporation can be caused without a vote of shareholders. See Article 11 of the Business Corporation Law, §§1107 - 1117, providing for judicial dissolution on petition of the attorney general, or of directors, as well as of shareholders. Even under Article 10 of the Business Corporation Law, the non-judicial dissolution of a New York corporation can be caused without a vote of shareholders in some circumstances, including non-payment of taxes. N. Y. Bus. Corp. Law §1009.

Section 909 of the Business Corporation Law normally requires shareholder approval (after authorization by the board of directors) of a total liquidation accomplished by disposition of all or substantially all the assets of a

corporation, if not made in the usual or regular course of the business actually conducted by the corporation. However, Article 9 of the Business Corporation Law does not require a vote of shareholders in order to effect either a partial liquidation, or a total liquidation if, for example, the corporation is disposing of a losing business that it could not continue without further loss. Skinner v. Smith, 134 N.Y. 240, 250 (1892); Raymond v. Security Trust Ins. Co., 111 App. Div. 191, 97 N.Y.S. 557, 560 (1st Dept. 1906); Petition of Avard, 5 M. 2d 817, 144 N.Y.S. 2d 204, 209 (Sup. Ct. Oneida Co. 1955), appeal dismissed, 2 A.D. 2d 647, 156 N.Y.S. 2d 970 (4th Dept. 1956); 277 Park Ave. Corp. v. N. Y. Cent. R. Co., 194 Misc. 417, 90 N.Y.S. 2d 214, 219 (Sup. Ct. N. Y. Co. 1949), affirmed 275 App. Div. 1028, 91 N.Y.S. 2d 838 (1st Dept. 1949), appeal denied 276 App. Div. 757, 92 N.Y.S. 2d 920 (1st Dept. 1949). See also Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106, 111 (S.D.N.Y. 1951).

There is no justification, in fact or in law, for construing the Trustee's explicit agreement "that he will not cause any of the corporations to be dissolved or totally or

partially liquidated" as limited to causation by vote of the shares that he held.

E. Claims dealt with in the bankruptcy proceeding.

The brief of appellees, at pp. 39-43, falsely suggests that Long Island Reo asserted claims against the defendants based upon the federal and New York Automobile Dealers' Day in Court Acts. 15 U.S.C. §§1221 - 1225, N. Y. General Business Law §197.

The answer (including counterclaims) of Long Island Reo and plaintiff Thomas A. Vincel, the defendants in the State court proceeding, appears at 328A - 338A. That document makes no reference to the Automobile Dealers' Day in Court Acts. Their amended answer and counterclaim appears at pp. 99A - 115A. Here too we find no reference to the Automobile Dealers' Day in Court Acts.

Nor does the bankruptcy trustee's answer and opposition to the claim of White Motor in the bankruptcy proceeding, 339A - 342A, even mention those statutes. The counterclaim of the bankruptcy trustee is based solely upon White Motor's breach of its fiduciary and contractual obligations to the bankrupt corporation.

Even if plaintiff Thomas A. Vincel, or Long Island Reo, or the bankruptcy trustee had made claims under those acts, the claims of plaintiff Thomas A. Vincel (and of

plaintiffs Nuno Tardo and William Breen) under those acts would have survived, along with the other claims of the plaintiffs against the defendants, under the specific terms of the settlement between the bankruptcy trustee and White Motor, the order of the bankruptcy court approving it, and the stipulations that provide for dismissal of the State court action without prejudice as between White Motor and plaintiff Thomas A. Vincel. Brief of plaintiffs-appellants, pp. 40 - 47.

CONCLUSION

The judgment of the court below, insofar as it grants the defendants' motion for summary judgment and dismisses the plaintiffs' action, should be reversed, and the case should be remanded for trial.

Respectfully submitted,

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Service of 2 copies of this within
Reply Brief is admitted this
10th day of April 1975, 10:42 AM

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